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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 493

MARTIN DUANE McGUIRE,
Petitioner,

vs.

STATE OF MARYLAND,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD D. E. ROLLINS,
Attorney General,

KENNETH C. PROCTOR,
Asst. Attorney General,

Attorneys for Respondent,
1201 Mathieson Building,
Baltimore 2, Maryland.

The Daily Record Co., Baltimore 3, Md.

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STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari to the Court of Appeals of Maryland. Petitioner, along with one Morton J. Hess and several other persons, was indicted by the

grand jury of Baltimore City under a charge of unlawful conspiracy to violate the laws of the State of Maryland relating to lottery. The conspiracy allegedly took place between June 10 and 15, 1951. Although the indictment contained three counts, Petitioner was tried on the second count only (5)*, the State having abandoned the first and third counts.

Petitioner filed a number of preliminary motions, including a motion to dismiss the indictment and each and every count thereof and a motion to suppress and exclude from evidence at the trial the content of certain telephone conversations (6-7, 11-14). Those motions were overruled by the Trial Court. The case was tried before the Honorable Joseph Sherbow, Associate Judge of the Supreme Bench of Baltimore City, and a jury. Upon the conclusion of the case, a motion was filed on behalf of Petitioner, in which he requested the Court to instruct the jury to render a verdict of not guilty (210-213). This motion was overruled by the Trial Court (214). The jury rendered a verdict of guilty under the second count (224).

Motion for a new trial was overruled by the Supreme Bench of Baltimore City and Petitioner was sentenced to serve eighteen months in the Maryland House of Correction and to pay a fine of $2,000 and court costs.

An appeal was taken from this judgment to the Court of Appeals of Maryland. The judgment was affirmed by unanimous decision of that Court in an opinion by Judge Henderson filed on November 11, 1952 (226-231), ... Md. ...., 92 A. (2d) 582.

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* References are to the Transcript of Record.

QUESTIONS PRESENTED

The Petitioner has submitted for the consideration of this Court three questions, which are substantially as follows:

I.

Did the Admission in Evidence, Without the Permission of the Sender, of the Substance of Telephone Conversations Obtained by Baltimore Police Officers by Means of Wiretapping Deprive Petitioner of His Rights Under the Constitution of the United States and the Amendments Thereto?

II.

Did the Admission in Evidence of the Lottery Paraphernalia Seized in an Apartment in Washington, District of Columbia, Deprive Petitioner of His Rights Under the Constitution of the United States and the Amendments Thereto?

III.

Did the Admission in Evidence of the Confessions, Statements or Admissions Made by Petitioner While in the Custody of the Police Deprive Petitioner of His Rights Under the Constitution of the United States and the Amendments Thereto?

STATEMENT OF THE FACTS

On Saturday, June 9, 1951, Lt. Ralph Amrein and Officer Isidore Glass of the Baltimore City Police Department made a wire tap on the telephone line leading into the premises 1402 West Baltimore Street (Gilmor 0914), listed in the name of Mrs. Myrtle Hess. Those premises are owned by Mr. Morton J. Hess, Appellant's co-defendant, who operated a confectionery and delicatessen in such premises (42, 171,

175). The officers proceeded to listen in on telephone conversations being made to and from that number. It was determined by the officers that they had tapped the correct telephone line (42, 176). Between the hours of 1.00 P. M. and 3.00 P. M., the two officers heard "Mr. Hess give out over the telephone to other people certain lottery numbers" (49, 177).

Having satisfied themselves that a lottery operation was being conducted by means of the tapped telephone, the officers proceeded to rent an apartment at No. 8 North Calhoun Street, Baltimore, Maryland (49, 177). A window in that apartment was located not more than fifty to sixty feet away from the box where the wire tap had been effected (177). Officer Glass proceeded to run a telephone wire out of the window of the apartment to the telephone pole where the wire tap had been effected and to make the necessary connection (49, 177).

At first, the officers merely monitored the telephone conversations overheard by them. However, after a short time, Sergeant William Pence installed in the apartment a recording machine on which all conversations were recorded on tape. Meanwhile, the officers continued to monitor the telephone conversations (49-50, 178-179) to and from Gilmor 0914. They were intercepted in that fashion on June 9, 10, 11, 12 and 13 (178-179, 185-186). The telephone calls which were monitored and recorded were intercepted on the last three days (185-186).

Officer Glass was able to identify positively the male voice which used the telephone, Gilmor 0914, in connection with the lottery operation as that of Mr. Morton J. Hess. He made this identification in two ways. First, on one occasion, such person identified himself by name and address in placing an order with a business house. Second, on June

13, after listening to the voice by means of wire tap, Officer Glass visited the store at 1402 West Baltimore Street and, under the guise of making purchases, talked with the proprietor, Mr. Morton J. Hess (178, 186-187).

A great number of the telephone conversations overheard by the police were concerned with lottery bets. Typical was a conversation on June 11, 1951, at 1.20 P. M., from Gilmor 0914 (Mr. Hess) to Randolph (Washington, D. C.) 4037 (Petitioner) (53, 54, 55, 56-59). Officer Glass identified Petitioner as the other party to that telephone conversation. That identification was based upon a comparison of the voice overheard at the time of the conversation with the voice of Petitioner at the time of the visit by the police from Baltimore and Washington to the Crestwood Apartments, Washington, D. C., on June 25, 1951 (192).

Beginning on the night of Wednesday, June 13, 1951 and working until about 7 A. M. on Friday, June 15, 1951, Lt. Amrein, Officer Glass, Sergeant William Pence and Mrs. Diven, a stenographer employed by the Police Department of Baltimore City, transcribed the recorded telephone conversations and checked the transcriptions to be certain of their accuracy (50-51, 183-185). Immediately thereafter, an application for a search and seizure warrant and the warrant were typed. The search and seizure warrant was issued by the Honorable Robert France, Associate Judge of the Supreme Bench of Baltimore City, on June 15, 1951. The warrant was directed to the premises 1402 West Baltimore Street and to one Morty Hess (89).

The officers executed the search and seizure warrant and found nothing as a result of their search (91-92). However, Mr. Hess did make certain admissions in discussing the matter with the officers. For example, after they ad-

vised Mr. Hess that they had tapped his telephone wires, they asked "Now that you believe — do you believe we know what is going on here?" He replied "You heard everything that went over the line, what do you want me to do, bury myself?" Also, after Officer Glass recited the six telephone numbers regularly called by Mr. Hess in connection with the lottery operation, Mr. Hess said: "He knows the numbers better than I do" (188, 92).

On June 25, 1951, Lt. Amrein and Officer Glass went to Washington, D. C. They first went to the Police Headquarters. From there, accompanied by two Washington Detectives, they went to the Crestwood Apartments, 3900 16th Street, N.W., Washington, D. C. There, they first talked with the Manager and then went to Apartment 429 (65-66, 189-190). The door to the apartment was opened by a Mr. Rosenthal. After talking with him for a few minutes, they went to apartment 424, in which apartment the telephone Randolph 4037 had been installed, according to the records of the Telephone Company (66-67, 173, 189-190). They entered that apartment and observed that the telephone had been removed (67). They returned to the hall and again talked with Mr. Rosenthal. As a result of that conversation, they went to apartment 430 (directly across the hall from apartment 429). They rapped on the door, received no reply and found that it was locked. As a result of further conversation with Mr. Rosenthal, they sent for the Manager. She came upstairs and, in the presence of Rosenthal, unlocked apartment 430 (68, 190-191). In the bathroom of that apartment they found Petitioner (68, 191). The three apartments, to which reference has just been made, and apartment 426 had been rented by Mr. Rosenthal in the name of a Senator Madragal, a Philipino (165-166).

Upon entering the apartment, Lt. Amrein asked Petitioner what he was doing there. His reply was: "I came in here to rest." The ensuing conversation, as related by the Lieutenant (69), was as follows:

> "* * * I said, 'How did you get in here?' He said, 'Some man gave me a key.' I said, 'Who gave you the key?' He said, 'I don't know him.' 'Some man; what does he look like?' 'I don't know, he just gave me the key to come in here.' I said, 'Why do you come in here to rest, there is no bed in here, there is only chairs?' He said, 'I come in here to rest.' I said, 'Do you know this gentleman here, Mr. Rosenthal?' 'No, sir.' I said, 'Do you know Mr. McGuire, Mr. Rosenthal?' 'No, sir, never saw him before.'
>
> "I then said to McGuire, 'Do they call you Mack?' 'Well', he says, 'some people might.' 'Well', I said, 'they do call you Mack, don't they? Your name is McGuire, they give you that name of "Mack"?' He said, 'Some people might.' "

This conversation is confirmed by Officer Glass (191). Miss McDowell, Manager of the apartment house, did not know McGuire. She had never seen him before (164).

The Lieutenant then observed lottery paraphernalia on a table in the room (69). That consisted of 341 lottery slips (71, 72). Those slips showed "the amounts of money played on various numbers, lottery numbers; they showed the name or code name or number of the player, they showed the number of the original and carbon copies in red ink and they showed the amount, total amount of money on the bottom of the paper" (73). These lottery slips covered 13,500 three digit numbers and an aggregate play of $6,477.22 (74). Also on the table were tally sheets which contained "the names of various people who called in numbers to this telephone number in the Crestwood Apartments, and the amount of money is alongside each name, as to the amount

that was played, and that total is $9,719.75" (76). The name of Hess appeared on one of those sheets and alongside it the figure 800 (77). In addition to those just referred to, additional items of gambling paraphernalia, usually used by lottery syndicates, were seized by the police (79, 80, 84-91).

Lt. Amrein examined all of this paraphernalia in the presence of Petitioner. He asked Petitioner: "Whose writing is that on there, whose figures are they?" Petitioner's reply was: "Well, they are mine" (69, 191-192). At no time was it denied that the handwriting on the lottery slips and tally sheets was that of Petitioner.

Lt. Amrein told McGuire that "He could either go with the Washington authorities or he could come to Baltimore with us * * *" (110). That statement was made in the presence of Mrs. McDowell, manager of the Crestwood Apartments (110). Although available, she wasn't called by the defense. Petitioner did not answer immediately. In a moment he asked permission to speak to Mr. Rosenthal and, being granted permission to do so, went to apartment 429 where he talked with that gentleman. In a few minutes, he came back and told the Lieutenant and Officer Glass that he would accompany them to Baltimore (96, 110). Petitioner had his car at the apartment house and asked the police if he could drive to his home and let his wife know where he was going. Lt. Amrein rode in Petitioner's automobile. They were followed by Officer Glass in the Baltimore City police car (96, 111). At Petitioner's home, in Takoma Park, Montgomery County, Maryland, all three went into the house while Petitioner talked to his wife. They then entered the Baltimore City Police car and drove to police headquarters in Baltimore City (97, 112-113). Petitioner was not placed under arrest until after he had made the statement, to which reference is hereinafter made, at police headquarters in Baltimore (103, 113).

Petitioner testified on the limited question of police activities prior to his statements, to which Lt. Amrein and Officer Glass testified. He stated that he was advised by Lt. Amrein that he could either remain in Washington and be charged with robbery or burglary, or he could go to Baltimore (123); that at no time was he out of the presence of a police officer from the moment when they entered apartment 430 until after he had made his statement at police headquarters in Baltimore (124-126).

During the ride from the Crestwood Apartments to Petitioner's home in Takoma Park, he and Lt. Amrein engaged in conversation which, as related by Lt. Amrein, was as follows (64):

> "I asked Mr. McGuire, whether they didn't call him 'Mack', and he said yes. I then told him and showed him the various figures that we had heard and asked him whether or not Hess didn't call those numbers in to him, or if that wasn't he that Hess called the numbers in to; that is the way I put my question. He said, 'Yes, I remember that, Hess called them in to me.' I then asked him how long he had known Hess, and he said he had known him for a short time, that he had visited him in his store in Baltimore. I then asked him who he worked for. 'Well', he says, 'I don't know'. Well, I said, 'Who — let's put it that way — who pays you?' He says, 'I don't know.' I said, 'Well, you don't back these numbers yourself, do you?' He said, 'No, how can I back them?' I said, 'Well, doesn't Rosenthal pay you?' He said, 'Yes.' I said, 'How much does he give you?' He says '$120 a week.' I said, 'Well, doesn't Ben Rosenthal rent the apartments where you were picked up?' And he said, 'Yes. Well, he told you he did. You saw his father's picture in the cupboard, naturally he rents it; he told you he rented it.' I asked him whether he was the figure man for this syndicate.
>
> "(The Court) What does that mean?

"(The Witness) Well, the man that takes care of the figures, the brains, the man that is good at calculating figures, adding up, and whatnot. And he said, 'Yes, I take care of the figures.' I said, 'How did you happen to get into that?' He said, 'Well, I did the same thing in Milwaukee, and things got bad down there and I came up here.' I said, 'Did Rosenthal bring you up here?' He said, 'No, I came up here on my own.' I said, 'Well, let me ask you this, Mack: Do you work for Rosenthal or do you work for Senator Madragal, the room, that the apartment is listed to?' 'No', he said, 'I don't work for Madragal.' I said, 'Well, now, the telephone is listed in the name of Benjamin Cassell', and he laughed; he said, 'I never saw him, I don't know him, I never saw Cassell'. Well, that is about — we may have talked about other things."

After Lt. Amrein, Officer Glass and Petitioner arrived at police headquarters in Baltimore, Petitioner made the statement which is set forth in full in Petitioner's Appendix at pages 130-142. In that statement, Petitioner admitted that he was a gambler (130); that he knew Morty Hess (131); that it was "possible" that he had a conversation with Morty Hess regarding lottery bets but that he didn't recall it (131); that the figures on the lottery sheets were his (134).

ARGUMENT

I.

Did the Admission in Evidence, Without the Permission of the Sender, of the Substance of Telephone Conversations Obtained by Baltimore Police Officers by Means of Wiretapping Deprive Petitioner of His Rights Under the Constitution of the United States and the Amendments Thereto?

Petitioner's first contention is that the Trial Court erred in admitting in evidence the content of telephone conversa-

tions, to which Petitioner was a party, intercepted by the police by means of wiretapping; that such action by the Trial Court not only was contrary to the provisions of the Federal Communications Act of 1934 (47 U. S. C. A., Section 605) but also deprived Petitioner of his rights under the Constitution of the United States and the amendments thereto.

However, this question has been determined adversely to Petitioner not only in several decisions of the Court of Appeals of Maryland, but, in a very recent decision, by the Supreme Court of the United States. Neither the Federal Communications Act nor the Constitution of the United States prohibits the use in State court proceedings of evidence obtained and sought to be divulged in violation of said Act. *Hitzelberger v. State*, 174 Md. 152, 165-169; *Rowan v. State*, 175 Md. 547, 559-560; *Leon, et al. v. State*, 180 Md. 279, 283-285 (*certiorari denied* 316 U. S. 680, 86 L. Ed. 1753); *Bratburd v. State*, ... Md. ...., 88 A. (2d) 446, 449 (*certiorari denied* December 22, 1952, not yet reported); *Schwartz v. Texas*, No. 41, October Term, 1952, Supreme Court of the United States (not yet reported).

II.

Did the Admission in Evidence of the Lottery Paraphernalia Seized in an Apartment in Washington, District of Columbia, Deprive Petitioner of His Rights Under the Constitution of the United States and the Amendments Thereto?

Next, Petitioner claims that the Trial Court erred in admitting in evidence, over his objection, the lottery paraphernalia seized by the Baltimore City Police (and members of the Police Department of the District of Columbia) in the Crestwood Apartments, 3900 16th Street, N.W., Washington, D.C., on June 25, 1951. The basis of this claim

is the contention that such evidence was obtained by means of an unlawful search and seizure and contrary to the provisions of the Fourth Amendment to the Constitution of the United States.

First, as the present proceedings arose in a State court, Petitioner cannot be heard to complain that he has been deprived of his rights under the Fourth Amendment to the Constitution of the United States. *Wolf v. Colorado,* 338 U. S. 25, 93 L. Ed. 1782; *Schwartz v. Texas, supra.*

Second, under the law of Maryland, Petitioner has no standing to object to the admissibility of such evidence. According to his own testimony, he was merely an interloper in the apartment. The evidence clearly showed that the apartment had been leased by Mr. Rosenthal in the name of Senator Madragal and that Petitioner had gone there merely "to rest" (69).

In answer to this contention, the Court of Appeals of Maryland said (92 A. (2d) (Adv. Shts.) 584-585):

> "The appellant next contends that the evidence obtained in number 430 of the Crestwood Apartments was inadmissible under the Bouse Act, which makes inadmissible, in prosecutions for misdemeanors of the type in question, evidence 'procured by, through or in consequence of any illegal search or seizure'. If the incident had taken place in Maryland, it seems clear that the evidence would have been admissible on several grounds. While the police had no search warrant they were admitted to apartment number 430 by the manager for the landlord in the presence of, and with the tacit consent of, the lessee or his agent, Rosenthal. Kershaw v. State, Md., 85 A. 2d 783, 785. It is also clear that under the Maryland authorities that McGuire, as a mere interloper or at best a guest, claiming no interest in the premises, would have no standing to object to the entry. Saunders v. State, Md., 87 A. 2d

618, 620 and cases cited. Upon entry, the gambling paraphernalia were in plain view and no search was necessary. McGuire admitted that the entries were in his handwriting. Had the incident occurred in Maryland, the officers would have been justified in arresting McGuire and seizing the evidence of a crime committed in their presence.

"It is contended, however, that the legality of the seizure depends upon the law of the place where made, rather than the law of the forum. If we assume, without deciding, that the Bouse Act is broad enough to cover seizures made outside the State, and that the principle stated is applicable, we do not find that the law of the District of Columbia is materially different from the law of Maryland as applied to the facts in the instant case. See Shore v. United States, 60 App. D. C. 137, 49 F. 2d 519, certiorari denied 283 U. S. 865, 51 S. Ct. 656, 75 L. Ed. 1469, cited in Saunders v. State, supra and Gibson v. United States, 80 U. S. App. D. C. 81, 149 F. 2d 381, certiorari denied, O'Kelley v. United States, 326 U. S. 724, 66 S. Ct. 29, 90 L. Ed. 429. We do not understand that the principles that an entry by consent freely given is not illegal, and that an interest in the premises greater than that of a guest is prerequisite to a valid objection, are shaken by McDonald v. United States, 335 U. S. 451, 69 S. Ct. 191, 93 L. Ed. 153, or United States v. Jeffers, 342 U. S. 48, 72 S. Ct. 93. * * *"

See also *Baum v. State*, 163 Md. 153, 156-157; *Frankel v. State*, 178 Md. 553, 562; *Bevans v. State*, 180 Md. 443, 448; *Resnick v. State*, 183 Md. 15, 18; *Lambert v. State*, ... Md. ..., 75 A. (2d) 327, 329-330; *Curreri v. State*, ... Md. ..., 85 A. (2d) 454, 455.

III.

Did the Admission in Evidence of the Confessions, Statements or Admissions Made by Petitioner While in the Custody of the Police Deprive Petitioner of His Rights Under the Constitution of the United States and the Amendments Thereto?

Finally, Petitioner claims that the confessions, statements or admissions made by him while in the custody of the police officers should not have been admitted in evidence by the Trial Court for the reason that such "confessions, statements or admissions" were obtained in violation of Petitioner's constitutional privileges.

None of the statements made by Petitioner to the police mounted up to confessions. At most, they were admissions by the accused, which are subject to different rules of evidence than confessions. *Delnegro v. State,* .... Md. ...., 81 A. (2d) 241, 245.

Neither of the authorities cited by Petitioner in support of this contention even approaches the factual situation presented here. In *Rochin v. California,* 342 U. S. 165, 96 L. Ed. (Adv. Shts.) 154, evidence of a violation of the narcotic laws had been obtained by the police by use of a stomach pump against the will of the accused. In *Williams v. United States,* 341 U. S. 97, 95 L. Ed. 774, a confession had been obtained from the accused by a private detective by the use of "a rubber hose, a pistol, a blunt instrument, a sash cord and other implements" — characterized by the Supreme Court of the United States as "brutal methods". In each of these cases, the Supreme Court of the United States held that the methods used deprived the accused of due process of law. Clearly, no such contention can be made in the present case.

CONCLUSION

It is respectfully submitted that there no merit to any of the contentions raised by Petitioner i his Petition and Brief, that there is no Federal question esented for consideration, and that, therefore, the Pition should be denied.

Respectfully submitted,

EDWARD D. E. RLINS,
Attorney Geral,

KENNETH C. PTOR,
Asst. Attorne General,

Attorneys r Respondent,
1201 Matleson Building,
Baltimor2, Maryland.